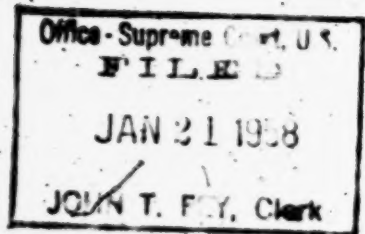


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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 88

ARTHUR THOMAS,

Petitioner,

vs.

STATE OF ARIZONA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S OPENING BRIEF

W. EDWARD MORGAN,
73 West Council,
Tucson, Arizona,
Counsel for Petitioner.

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COMES NOW the Petitioner, ARTHUR THOMAS, by his Counsel, W. EDWARD MORGAN, and hereby sets forth his Brief:

(a)

**Reference to Official Reports of Opinions Delivered
in the Courts Below**

State of Arizona v. Arthur Thomas, 78 Ariz. 52,
275 P.2d 408;

State of Arizona v. Arthur Thomas, 79 Ariz. 158,
285 P.2d 612;

*In the Matter of the Application of Arthur Thomas
for a Writ of Habeas Corpus, United States Dis-
trict Court for the District of Arizona, Unofficial
Report Minute Entry, Denial of Application
March 13, 1956;*

Arthur Thomas, Appellant v. Frank Eynan, Superintendent of the State Prison of Arizona, Appellee, 235 Fed. 2d 775.

(b)

**Statement of Grounds of Jurisdiction of the
Supreme Court of the United States**

In the Matter of the Application of Arthur Thomas for Writ of Habeas Corpus before the United States District Court for the District of Arizona, application denied March 13, 1956. Appeal was duly made to the United States Circuit Court of Appeals for the Ninth Circuit, known as *Arthur Thomas, Appellant v. Frank Eynan, Superintendent of the State Prison of Arizona, Appellee*, Case. No. 15,098. Appeal denied and District Court affirmed August 8, 1956. Motion for Rehearing filed submitted. September 11, 1956, Motion for Rehearing denied.

The statutory provisions which confer on this Court jurisdiction to review the judgments and decrees in question by Writ of Certiorari are: 28 U.S.C. 2101.

(c)

Pertinent Constitutional Provisions

ARTICLE 5

United States Constitution — Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled

in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE 14

United States Constitution — Amendment

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(d)

The Questions Presented for Review

1. Whether or not the Defendant's Constitutional rights as guaranteed by the United States Constitution, and in particular Article 5 thereof and the Fourteenth Amendment thereto, granting to the Defendant the right of trial in conformity with due process, were denied by the State Court by reason of allowing into evidence a confession obtained by fear, duress and coercion.

2. Whether or not the United States District Court erred in denying the application of the appellant without granting a Writ of Habeas Corpus or issuing an Order to Show Cause; and without ordering a plenary hearing, when a question of fact was presented by the application going to the question of whether or not the Defendant's Constitutional rights under Article 5 and Amendment 14 thereto

had been violated in the procedures of his case before the State Courts.

(e)

A Concise Statement of the Case

The Appellant herein was accused of the commission of the crime of murder.

The Defendant was placed on trial June 1, 1953, in the State Court. During the course of that trial, the Defendant objected and his objection was overruled, to testimony of the State's witness L. T. Frazier as to a purported confession made by the Defendant. Defendant's objections were that the confession was involuntary and obtained by coercion and fear and therefore inadmissible under Articles 5 and 14 of the U. S. Constitution. The objection was overruled; testimony was admitted; and on June 19, 1953, the Defendant was found guilty on the charge of first degree murder and sentenced subsequently to death. The Defendant is still in custody pending execution of the sentence.

The case was appealed to the Supreme Court of the State of Arizona and the issue of the inadmissibility of the confession and the violation of the Defendant's rights, both State and Federal, were raised on appeal and determined adversely to the Defendant as reported in the Arizona case known as *State of Arizona v. Arthur Thomas*, 78 Ariz. 52, 257 P.2d 408.

Subsequently, the Appellant herein petitioned the United States Supreme Court for Writ of Certiorari, which Writ was denied without ruling.

On March 1 and March 9, 1956, W. Edward Morgan, acting in behalf of the Appellant, filed two applications for Writ of Habeas Corpus, C.R. 1 and R. 5, R. 7, setting forth

that the Appellant, Arthur Thomas, wished to give testimony in person to the Court showing that he had been coerced and that as a result of this coercion the confession which was admitted into evidence in the Trial Court was obtained in violation of the Federal Constitutional rights of the Defendant and that the introduction of the evidence over his objection was therefore error and a violation of due process; that, further, Appellant wished to introduce evidence which would indicate and show that an officer of the State of Arizona, to-wit: the head of the State Highway Patrol Department, by administrative order, kept a key witness to the acts of coercion, to-wit: Harry Selchow, an Arizona Highway Patrolman, from informing the Defendant or his Counsel of what his testimony would be if called as a witness; that Appellant, in his application, alleged that because he did not know the testimony of this important witness prior to the time he placed him on the stand and because of the fact that the witness refused to talk to either the Defendant or his Counsel prior to the time of answering questions at the time of the trial in chief, the Defendant was denied by an act of an officer of the State the ability to properly prepare his case and was therefore denied due process. The Appellant, through his Counsel, was informed that there was another witness who was an employee of the State, a member of the State Highway Patrol who was a witness to the putative lynching of the Appellant Arthur Thomas; that again the Appellant did not even call said witness, for the reason that he did not know that the party was a witness to the lynching and therefore did not know what he could testify to.

It was these matters which by Petitioner's application for Writ of Habeas Corpus he wished to raise before the Federal Court. Arthur Thomas had no opportunity to raise this particular issue in this particular form prior to this date because until just prior to the time of the appli-

cation for Writ of Habeas Corpus he could not obtain and did not have the sworn confirmation of the head of the State Highway Patrol of Arizona, Mr. Gregg Hathaway, that he had issued such an order. Arthur Thomas had no opportunity at that time to present these issues in the State Court, inasmuch as he had exercised all of his rights of appeal in the State Courts and the only procedural remedy available to him was a Federal Writ of Habeas Corpus.

The Federal District Court, after examining the transcript of record and the briefs of the Defendant and the State, as filed in the State Courts, denied the application without having the Defendant brought into a hearing to testify and without issuing the requested subpoenas and having a hearing on the witnesses which the Defendant wished to present to the Court in proof of his allegation that Gregg Hathaway had issued an order that the Highway Patrolman in question should not give any statement to the Defendant or his Counsel and should respond only to a subpoena to appear at the Trial Court and testify under oath at the trial. Defendant Arthur Thomas, through Counsel, in fact requested and made application of the United States District Court for the District of Arizona, to issue a subpoena to Gregg Hathaway, and Gregg Hathaway had assured Defendant's Counsel that he would appear to testify in response to a subpoena.

It is the denial of such relief and permission to place such evidence before the District Court that the Defendant appealed to the United States Circuit Court of Appeals. The U. S. Circuit Court of Appeals for the Ninth Circuit denied Defendant's appeal and affirmed the lower Court's decision. It is from that affirmation that this application for Writ of Certiorari was made.

(f)

ARGUMENT

The prime question presented throughout all of the appeals of the Petitioner, Arthur Thomas, has been whether or not, when considering all of the facts in the case, the conduct of the State Trial Court in admitting into evidence a confession by the Defendant as to his culpability in the murder of the deceased, Janie Miscovitch, was such error as to be a denial of the Defendant's rights to a fair trial, in accordance with the United States Constitutional provisions providing for due process.

The question of whether or not it was error, then, resolves itself to the problem of whether or not the confession was obtained by coercion. To understand whether or not the confession was obtained by coercion, one has to look into all of the circumstances involved.

See:

Ashcraft v. Tennessee (1944), 322 U.S. 143, 88 L.Ed. 1192, 64 S.Ct. 921.

The background of this case concerning the voluntariness of the confession of the Defendant Arthur Thomas is as follows:

The Defendant was a Negro, approximately 27 years of age, an itinerant cotton picker; he lived in a shanty with his common-law wife in a predominantly Southern community, a community which still exercises Jim Crow practices. He was charged with murdering a middle-aged, respectable, hard-working white woman. Petitioner had no friends, no attorney, no funds. The murder was apparently a vicious one, the deceased dying from a stab wound in the heart, and part of the body was consumed by fire, and there was intimations throughout the trial, which must

have existed previously in the minds of the people who arrested the Defendant, that there was not only a murder, but that there had been a criminal assault of the deceased.

Defendant was arrested the 17th. of March, 1933, in the afternoon, and was not taken to a committing magistrate and arraigned until the following day, March 18, at noon time, which was a violation of the Statutes of the State of Arizona, to-wit:

A.R.S. 1956, 13-1417;

A.C.A. 1939, 44-107;

Rules of Criminal Procedure, Par. 6, A.R.S. 1956.

That he was taken immediately after his arrest to the mortuary, about twenty-five miles north of where he was arrested, and was forced to view the grisly remains of the deceased. At the time of his arrest, he was unarmed, and offered no resistance, but was roped about the neck in the presence of the Sheriff, and there was testimony of an Arizona State Highway Patrolman that the Sheriff, Jack Howard, had said, in effect, "If you don't tell them you did it, I will let them hang you."

That subsequently, within approximately twenty minutes, the Petitioner, Arthur Thomas, was taken to another point in the general vicinity, and watched while another Negro, who was also under suspicion for the charge, was roped by members of the posse on horseback and dragged across the open field at the end of a rope, and the Petitioner was again roped around the neck and body with the other Negro by the same members of the posse.

The Trial Court ruled, in an ancillary procedure, as provided under the laws of the State of Arizona, to-wit:

Kermeen v. State, 17 Ariz. 263, 171 Pac. 738;

Indian Fred v. State, 36 Ariz. 48, 282 Pac. 930;

State v. Romo, 66 Ariz. 174, 185 Pac. 2d 757;

that as a matter of law, a confession obtained by the County Attorney at his home twenty minutes after the Petitioner Arthur Thomas' arraignment on the day after his arrest, to-wit: on March 18, 1953, was inadmissible for the reason that the coercion of the Defendant occurring at the time of his arrest on the 17th of March was such as to place the Defendant Thomas in a sense of fear, and that therefore the confession was involuntary and inadmissible.

See Transcript of Testimony, pages 2063 through 2066 of the Transcript of Testimony contained in eight volumes, a copy of which is annexed hereto as a portion of the Appendix, as pages 21 through 25.

Also the Court ruled that the confession obtained from the Defendant Arthur Thomas on April 1, after Counsel had been appointed, while the Defendant was incarcerated in the same jail which was run by the Sheriff who had arrested him, and helped at the roping of the Defendant, was inadmissible on the basis of the continuing fear arising out of the incidents of his original arrest. The County Attorney who had tried the case attempted to deny that Counsel W. Edward Morgan was really Counsel in the case, even though the Defendant had been arraigned in the Superior Court prior to April 1, and at which time Counsel was appointed, and even though the record indicates that prior to April 1 the County Attorney and the Defendant's Counsel, W. Edward Morgan, had corresponded regarding several motions, all of which is set forth in some particularity in an Affidavit filed by Counsel in his original Petition for Certiorari with the United States Supreme Court in October, 1955.

The Trial Court allowed into evidence before the jury the confession of the Defendant, Arthur Thomas, Petitioner herein, obtained on March 18, 1953, before a Magistrate, on the theory that the confession was before a Magistrate,

in open Court, to-wit: a Justice of the Peace in his courtroom, and that the only person present who was present at the roping of the Defendant, Arthur Thomas, was Sheriff Jack Howard, who, the evidence which had been introduced by the State up to that point would indicate, had kept the unofficial posse of local ranchers (all white men) from completing the lynching of the Defendant, Arthur Thomas. Subsequently, and only after the State had rested, did the Defendant put on the testimony of the Arizona State Highway Patrolman, Harry Selchow, which conclusively showed that the Sheriff had taken an active part in the roping, and had threatened the Defendant, that he either admit that he had committed the crime, or he, the Sheriff, would let the mob go ahead and finish their roping of him.

(See our Appendix, pages 23-26, which is a true copy of pages 2324 through 2329 (pp. 38-43 from Petition for Certiorari) from the original Transcript of Testimony in the original trial in the Superior Court of Cochise County, in the original case of *State of Arizona v. Arthur Thomas*.)

The State Court, in its original decision in the case of the *State of Arizona v. Arthur Thomas*, 78 Arizona 52, 275 P.2d 408, and the Federal District Court, in its decision and Order denying Petition for Writ of Habeas Corpus (T. 7), and the United States Circuit Court of Appeals for the Ninth Circuit (T. 20, 26), all placed a great deal of reliance on the statement that the jury had submitted to it the question of whether or not the confession of Arthur Thomas, given to Judge Frazier at the time of his original arraignment in the Justice Court, was voluntary or involuntary; that it must have been that the jury found that the confession was voluntary, and therefore that the jury having decided that, no other body or Court could examine that issue. This line of logic has always borne some question of validity in Counsel's mind.

The law in the State of Arizona is not that, if the jury were to find that the confession was involuntary, that they must acquit the Defendant, but only that they may disregard that, or that if there is sufficient other evidence to convict the Defendant, the jury may do so.

Therefore the problem is entirely this, between what the jury in the trial had to determine, and what the Federal Appellate Courts must decide. And also, there is a substantial difference between the question which the State Supreme Court must propound, and what the Federal Courts must examine, in that, as set forth in the opinion of the State Supreme Court in the original opinion in this case, the *State of Arizona v. Arthur Thomas*, 78 Ariz. 52; that in accordance with the Arizona Constitution and State opinions, that a conviction will not be set aside if substantial justice has been done.

There is in the State of Arizona no method by which a Defendant might obtain special verdicts from a jury, and therefore as a matter of fact there is no way to determine whether or not the jury did or did not in the instant case decide that the confession of Arthur Thomas of March 18, 1957, to Justice Frazier, was or was not voluntary. The Supreme Court of the State of Arizona only had to decide whether or not substantial justice was or was not done, and if in their opinion there was substantial justice done, then whether or not the conviction was or was not voluntary would not of itself necessitate that the conviction would have to be set aside. This line of argument was adopted by the State in its Answering Brief in the original case, and the United States Supreme Court's decision of *Stein v. New York*, 346 U.S. 156, 97 L.Ed. 1522, 73 S.Ct. 1077, see page 68 of Appellee's Brief filed in the Supreme Court of the State of Arizona, in the *State of Arizona v. Arthur Thomas*, Case No. 1045, which was the

case which resulted in the written opinion found in the official reports as 78 Ariz. 52.

In the decision in *Stein v. New York*, *supra*, the Supreme Court of the United States enunciated a doctrine, which doctrine was outside of the habitual frame of reference of decisions by that Court; that is, the Supreme Court held that if the record of the State Court's proceedings indicated that there was sufficient legally admissible evidence to justify a conviction, the Supreme Court would not upset such conviction because there had been admitted supporting evidence which was illegal and violative of the United States Constitution; but in *Leyra v. Denno*, 347 U.S. 556, 74 S.Ct. 716, the United States Supreme Court returned to its main channel of constitutional interpretation; that is, that whenever the substantial constitutional rights of the Defendant are violated, regardless of whatever other evidence there is of guilt, the matter before the Court is to cure the violation of the United States Constitution, not to determine the issue whether the Defendant was or was not innocent, or whether or not there was sufficient evidence aside from the illegal and inadmissible evidence to convict the Defendant.

In determining whether or not the confession of the Defendant before the committing Magistrate on March 18, 1953 was or was not coerced, and what the reaction of the trial jury was, it should be noted that the jury did not know that there was a confession obtained twenty minutes after the arraignment on the 18th, and that there was a further confession on April 1 by the Defendant. The only thing the jury knew was that the man was before a magistrate and admitted that he was guilty, and didn't know that the man had confessed subsequently, and that the Court, as a matter of law, understood those confessions to be the result of coercion, which coercion was

impressed upon the Defendant on March 17, the day of his arrest. It is clear, then, that there is a difference in the yardstick by which the question of whether or not the confession of Arthur Thomas was admissible or inadmissible, was error or not error, was coerced or not coerced, between the one used by the United States Supreme Court, which solely determines whether or not it was in fact coerced, and that of the trial jury, which we must guess determined that the confession was not coerced, and the yardstick of the Supreme Court of the State of Arizona, which was to see whether or not there was substantial evidence to convict the Defendant.

On the question of whether or not the Federal District Court, upon the application of the Petitioner for a Writ of Habeas Corpus, could rely solely on the record, and the decision of the Arizona State Supreme Court, it is interesting to note that in his memorandum opinion of March 13, 1956, he says, and I quote:

"I desire to supplement the remarks I made at the oral hearing, by stating that the language of the United States Supreme Court, in *Brown v. Allen*, 344 U.S. 443, dealing with confessions, must be read in the light of what the Supreme Court said later in *Stein v. New York*, 346 U.S. 156—brought to my attention by the County Attorney and the Assistant Attorney-General."

If, then, as by his own words, the Federal District Court was following the ruling of the Supreme Court in *Stein v. New York*; *supra*, then he, too, was only looking to see whether there was substantial evidence of the Defendant's guilt, and not whether or not there was a violation of the Constitution, which violation of the Federal Constitution alone, regardless of whether or not sufficient other evidence to convict the Defendant was present, would demand a new trial for the Defendant.

Each Court has relied fundamentally upon the doctrine of substantial justice. Each Court has relied on the myth that the jury in the original trial determined that the confession was fundamentally voluntary. Yet, though stated in the original decision of the Supreme Court of the State of Arizona, "It is clear that the Defendant is guilty," there has never been a clear-cut examination on the merits whether or not the statement made by the Defendant, Arthur Thomas, was or was not coerced at the time he was before the Magistrate on March 18, 1953.

The question is, how many fictions can you build up upon which to predicate a denial to this Defendant of an opportunity to show that his rights were violated? Is there any question that the Defendant was a man without any funds; without any friends in the community; that the Negroes were a tiny minority of the population; that it was a Southern community; that it was current belief at the time that the murdered woman had been criminally assaulted; that the Defendant had no Counsel present at the time of the arraignment; that he was in the presence of the Sheriff who had allowed him to be roped and dragged, and who had threatened him that if he didn't tell the truth, he would let him be hanged; that the defendant had been taken and shown the grisly remains of the deceased, just the night before being brought the next day before the committing Magistrate; that his rights had been violated in not being brought before a committing Magistrate forthwith, as provided in the Statutes and Constitution of the State of Arizona?

It would then appear that, in accordance with the decision of the Ninth Circuit Court of Appeals heretofore referred to in this case, that some reliance is placed upon the fact that the trial Judge didn't grant a new trial on the issue as to whether or not the confession was admis-

sible or not. The time sequence of the evidence becomes very important in understanding this point. It is not denied anywhere in the record or in connection with Petitioner's petition for a Writ of Habeas Corpus, or in his Appeal to the Ninth Circuit Court of Appeals; or denied by State of Arizona or any of its agents, that the Superintendent of the State Highway Patrol, an officer of the State of Arizona, ordered a witness, Harry Selchow, as an employee under the said Gregg Hathaway, not to discuss the case with the Defendant or his Counsel, and only to respond to a subpoena of a duly constituted Court, and to only give testimony under oath at the trial; nor is it denied that there was no process by which the Defendant could get a subpoena issued and take the testimony of that witness, Harry Selchow, prior to the trial. Nor is it denied that the Defendant did not therefore know what Harry Selchow would or would not testify to, if called as a witness.

On the trial of the case, when the State attempted to introduce the two confessions of March 18, the one before the committing Magistrate, the second one obtained twenty minutes later, at the County Attorney's home, and the third one, obtained April 1, the Trial Court heard evidence as to the voluntariness of the confessions outside of the presence of the jury. The defendant had issued a subpoena for the witness, Harry Selchow, to give testimony, and to be present at that time.

However, the Court made its ruling, that the confession of March 18, obtained at the County Attorney's office, was irregular, as being involuntary, and ruled that the confession of April 1, 1953, was irregular as being involuntary, both being coerced by reason of the method of the Defendant's arrest, and when Defendant's Counsel attempted to put on further evidence which would have included Harry Selchow, on a gamble that Harry Selchow would tell the truth of what had occurred, and implicate the Sheriff, the

Trial Court refused to allow the Defendant to put on any more evidence concerning the putative lynching.

The Defendant, not knowing what Harry Selchow's testimony was going to be, could not then, as part of his objection to the Court's ruling denying him the right to put on further evidence concerning the putative lynching and resultant coercion of the Defendant, could not make an offer of proof, which offer of proof could have been made, and could have shown the Court that the Sheriff, whom the Court was relying upon as being a good friend of the Defendant, and therefore giving the confession of the Defendant at the time of arraignment before the Magistrate an aura of voluntariness, was in fact a real party to the putative lynching.

Therefore the Court relied, in the ancillary procedure to determine whether or not the confession of March 18 was or was not voluntary, on a false statement of fact.

After the Court had ruled, and allowed the issue of the confession of the Defendant before the Magistrate to go to the jury, the trial Judge had no more control, even though the Defendant was now in a position of jeopardy, and had to take a chance and put a witness on the stand with whom he had no opportunity to discuss the case or his testimony prior to the trial, by reason of the act of the agent of the State of Arizona, to-wit: Gregg Hathaway, the Superintendent of the State Highway Patrol. It was Selchow's testimony which, for the first time, indicated the true role which the Sheriff took in the putative lynching of the Defendant.

It is interesting to note that, in accordance with the testimony of the Sheriff, which is set forth in the Appendix at pages 26-36, he never attempted, nor did the County Attorney ever prosecute, or attempt to prosecute, the two

local ranchers who, on horseback, roped and dragged the Defendant, Arthur Thomas, and the other Negro suspect, Ross Lee Cooper; that in fact, the County Attorney advised the two said ranchers to claim the privilege of refusing to testify when called upon by the Defendant, in accordance with the Fifth Amendment to the United States Constitution, to refuse to testify for the reason that they might tend to incriminate themselves. This, then, was the high moral sense which the County Attorney, who prosecuted the case, and the Sheriff, who arrested the Defendant and testified against him, had in regard to their duty as public officials, to see that parties who broke the law of the State of Arizona were properly investigated and prosecuted.

The Defendant and his Counsel don't know whether or not the jury would or would not have convicted the Defendant, if the confession of the Defendant of March 18, 1953, to the committing Magistrate, had not been allowed to go to the jury. We don't know whether or not they thought it was coerced or not. Legally speaking, there may have been sufficient circumstantial evidence for the jury to have felt that the defendant was guilty without considering the confession.

Therefore, it is respectfully submitted that the District Court erred in not granting to the Defendant the right to subpoena and bring forward the witnesses to show how the Defendant's rights had been violated, in that he had not had an opportunity to examine his witnesses prior to trial by reason of the conduct of an officer of the State of Arizona, to-wit: the head of the State Highway Patrol. It was error for the Federal District Court Judge to rely in his decision upon the decision of *Stein v. New York*, *supra*, in determining whether or not he would issue or grant Petitioner's Writ of Habeas Corpus.

This Court has stated that the use of any confession obtained in violation of due process requires the reversal of a conviction even though unchallenged evidence, adequate to convict, remains.

Gallegos v. Nebraska (1951), 342 U.S. 55, 96 L.Ed. 86, 72 S.Ct. 141;

Stroble v. California (1952), 343 U.S. 181, 96 L.Ed. 872, 72 S.Ct. 599;

Leyra v. Demmo, 347 U.S. 556, 74 S.Ct. 716.

Whether or not the other evidence in the record is sufficient to justify a verdict of guilty is not necessary to consider where a coerced confession was introduced over Defendant's objection; if such admission denied a Constitutional right of Defendant the error requires reversal.

Lyons v. Oklahoma (1944), 322 U.S. 596, Note 1, 88 L.Ed. 1481, 64 S.Ct. 1208.

In summary, to analyze whether the confession by the Defendant, Petitioner herein, was involuntary, one should examine each of the elements which would show that confession involuntary. Each of the following enumerated elements which would indicate that the confession before the Magistrate was involuntary have been ruled upon by this Court in one case or another so well known to the Court that Counsel would not abuse the Court's eyesight by reiterating them:

1. The Defendant was an ignorant farmhand.
2. He was a Negro in a white community.
3. He was a Negro accused of killing a white woman.
4. He had no friends or relatives to aid him.
5. He was without Counsel or funds to hire Counsel.

6. He had no expectations of getting any funds to obtain Counsel or to expect that Counsel would be made available to him.
7. He was roped and dragged by a white posse.
8. He saw a fellow Negro roped and dragged by the same posse.
9. He was roped and dragged with another Negro.
10. He was not immediately taken to a Magistrate for arrest but was taken thirty miles north of the point of his arrest to view the dismembered and burned remains of the deceased in a mortuary.
11. He never had local Counsel until the day of trial, but had Counsel who had to travel seventy miles from the city of Tucson to see him.
12. He was alone, without friends or Counsel in the jail, which was run by the Sheriff who had taken part in his roping.
13. He was besieged for a confession in his jail cell even after Counsel had been appointed for him, and was still so afraid that even the Trial Court held that the confession obtained nearly a month after his arrest was involuntary as being still under coercion.

(g)

CONCLUSION

The Petitioner respectfully requests that the relief he desires is as follows, either alternately or cumulatively:

1. Remand the case back to the Federal District Court with instructions to that Court to grant the Petitioner Arthur Thomas the right to present additional testimony concerning the issue of the voluntariness of the confession.
2. Remand the case back to the State Court for the purpose of a new trial on the basis that the Defendant was denied due process of law in the original trial before a jury in the State, for the reason and upon the grounds that the Constitutional rights of the Defendant were violated when the State Court permitted the introduction of the confession, said confession being held to be involuntary by this Court.

Dated January 8, 1958.

Respectfully submitted,

ARTHUR THOMAS, by his next best
friend and Counsel

W. EDWARD MORGAN
Attorney at Law
73 West Council
Tucson, Pima County, Arizona

APPENDIX

Transcript of Testimony

[Page 2063]

Mr. Polley: Nothing except that we resist the motion, if the Court please.

The Court: Well, the Court feels this way about it. I have read your authorities on voluntary and involuntary confessions, and I have studied the citations carefully, and I have studied the exhibits in relation to these, and the Court recognizes the fact that the friends and neighbors of the deceased might well have been highly and justifiably incensed on finding her slain body. Many of us might well have felt the same way. However, neither good morals nor the Constitutions of the United States and the State of Arizona will tolerate an individual or a group taking the law into their own hands.

There are countries where confessions are extorted by devious and improper methods that run counter to our American way of life or our constitution. Our ancestors gave us the Bill of Rights and the law of due process, and to settle these time-honored and sacred laws would be to invite anarchy and dictatorship.

The Court will not in any way honor any confession procured by and under threat of attempted lynching. Under such circumstances, a confession is not voluntary, and its

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credibility is doubtful, and therefore barred by our constitution, and the Court, therefore, feels—

I have been studying the matter. Counsel brought this matter to a head before the Court intended saying any more about it, but since counsel has, I am going to sustain counsel's objection to the introduction of State's Exhibits 51 and 53, because they are confessions and they are obtained, having been procured by threat of lynch, and the Court does not propose to be a party in anywise to any attempt of lynching.

And I will deny the motion for mistrial. That takes away the confession that you say that Percy Bowden secured, and it takes away No. 51.

I believe 53 was the one that was under the influence of Percy Bowden.

May I see those?

State's Exhibit 53. This is the one, I believe, where Percy Bowden was involved, and 51 is the one taken on the 20th day of March. Both of those are confessions and the Court will sustain the objection to the introduction of those two exhibits in evidence, and we shall proceed.

If counsel wishes to see the exhibits, he may see what the Court has done.

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Mr. Tomlinson: As I understand it, your Honor, the Court denies 51 and 53.

The Court: The Court denies 51 and 53. The other, the Court of course can in nowise say that that is a confession. No. 52 is not a confession.

Mr. Morgan: We haven't seen this one, you know, your Honor.

The Court: Fifty-three is the one you haven't seen, and it is out anyway. The Court is not going to permit it to be introduced.

Mr. Morgan: If your Honor please, you understand our motion for a mistrial is predicated on a theory of lack of preparation for trial. You see, that is our basis there, your Honor, and it is not just on the matter of confessions. It is a different matter, if the Court please.

The Court: Well, if your client hasn't seen fit to apprise you of all of these things, Mr. Morgan, it is no fault of the State, and if your defendant has left his counsel in the dark, that is his lookout and not the State's or the Court's, and the Court is going to deny your motion for a mistrial.

Mr. Morgan: Could I make one further statement on that matter?

The Court: Sure.

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Mr. Morgan: Our theory is that the defendant was in fear from the lynching—from the roping. Excuse me, your Honor. The roping. Strike that, please.

That that fear continued through; that the defendant was still in that fear, and he was given a confession to sign eleven days after the attorney was appointed, if the Court please, and it was a continuing fear.

The Court: You mean he was in fear of his own counsel?

Mr. Morgan: What good is his counsel if a man is sitting in jail and the counsel says, "I will plead not guilty. I am your buckler against the whole world." and then they come up in jail and have him sign a confession.

That destroyed the man's confidence in his counsel. No wonder the man hasn't spoken to us, That is the reason for the mistrial.

The Court: The Court rules those out. The Court denies the motion for mistrial.

Let us proceed. If there is any further statement, you may make it for the record, but the Court is going to deny the motion.

Mr. Morgan: No further statement, if the Court please.

[Page 2324]

Further direct examination (Harry Selchow).

By Mr. Morgan:

Q. Now you were an officer of the Arizona State Highway Patrol on March 17, 1953?

A. I was.

Q. Were you out at Kansas Settlement at any time that day, Officer?

A. I was.

Q. Were you out there in your official duty capacity?

A. I was, sir.

Q. At any time that afternoon, did you see Arthur Thomas, the man who has now been identified as Arthur Thomas?

A. I did.

Q. Where did you see him, Officer?

A. I saw Mr. Thomas laying on the ground.

Q. And where was that approximately, according to State's Exhibit 7 behind you, Officer Selchow? Would you point out—let me point out to you that this purports to be the north-south highway known as Kansas Settlement highway, and that this purports to be the barracks in which Ar-

thur Thomas lived, and this purports to be the store, the Hitching Post Store, as indicated by this notation.

Now on which side of the road did you find Arthur Thomas?

A. On the west side of the road.

Q. That would be over on this side here?

A. That is correct.

Q. And about how far south of the barracks did you find him?
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A. Oh, it must have been about a mile, I think.

Q. And when you came up upon him, he was lying down? Who else was present, if you remember?

Mr. Polley: If the Court please, this is his witness, and we are going to object right now to leading the witness.

The Court: Yes. Try and avoid leading the witness, Mr. Morgan.

By Mr. Morgan:

Q. Who was present when you came up, if anyone?

A. Mr. Byrd and Mr. Brashear.

Q. What happened next?

A. When I arrived there, Mr. Byrd was talking to Mr. Thomas, asking about some cuts on his fingers, and about that time Mr. Howard got there, and Mr. Howard talked to him.

Mr. Pidgeon: If the Court please, we are going to object to the narrative testimony.

The Court: Yes, I will sustain the objection.

By Mr. Morgan:

Q. Mr. Howard came up, and what did he do, if anything?

A. He knelt down beside Mr. Thomas and he talked to him and asked him why he had killed the woman. He said,
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"No, I didn't. The other boy did."

Mr. Howard said, "We have your blood from the store. We have your shoes, and we have tracked you from the store."

Q. Then what happened, if anything?

A. Then Mr. Howard said, "You are under arrest." And Mr. Thomas stood up and I put the handcuffs on him.

Q. And then what happened, if anything?

A. Somewhere from behind me, a rope was thrown over Mr. Thomas' neck, and he was pulled back into me, and we stumbled a little bit, and I had ahold of the rope, and then Mr. Howard came around me, and I said, "Jack, this is no way to handle this."

Mr. Howard went on to the rope and took ahold of it. At that point, he says, "Will you tell the truth, or I will let them go ahead and do this," or, "I will go ahead and let them use this."

Q. Which Jack are you referring to?

A. Mr. Howard.

Q. Sheriff Jack Howard?

A. That is correct.

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Q. And he said what?

A. "Are you going to tell the truth, or ought I go ahead and let them use this on you?"

Q. And who was he referring to?

A. Mr. Thomas.

Q. All right. What happened then, Officer Selchow, if anything?

A. Well, Mr. Thomas was jerked about that time, and I walked back towards my car.

Q. Mr. Thomas was jerked? How was he jerked?

A. Well, the slack was taken out of the rope.

Q. And you went back to your car?

A. I started back towards my car, yes, sir.

Q. Then what happened, if anything?

A. The next time I saw them, they were—the rope was off of Mr. Thomas' neck, and they were walking toward Mr. Howard's car.

Q. Did you see anything more that afternoon of Mr. Thomas?

A. Only—when I got back on this highway here, I saw Mr. Thomas in Mr. Howard's car.

Q. Did you see Ross Lee Cooper that afternoon?

A. No, sir.

Q. Now at the time that Arthur Thomas was roped [Page 2329]

around the neck, and Sheriff Jack Howard made that statement, were there any other statements made in the presence of the defendant?

A. None I can remember.

Mr. Morgan: That is all. Your witness.

* * * * *

[Page 2210]

Recross examination (Jack Howard).

By Mr. Morgan:

Q. Did you notice any other wounds on the defendant, or any other burns?

A. I noticed a slight one on the neck.

Q. Didn't you testify on direct examination, Jack, that you didn't see any wound on his neck?

A. I don't think so. I might have. I noticed a little ... (Indicating).

Q. All right, Jack. When was the first time that you saw Arthur Thomas? What date and Where?

A. March the 17th, about 2:30 in the evening.

Q. About 2:30 in the afternoon?

A. Somewhere along in there.

Q. Where was this, Jack?

A. It was about, oh, I would say around two and a half miles—no, it wasn't that far. It was about a mile and a half, I guess, south of the Kansas Settlement store.

Q. What were you doing out there?

[Page 2211]

A. About two hundred, maybe something, yards west of the Kansas Settlement Road.

Q. What were you doing out there, Jack?

A. I was looking for tracks.

Q. For what reason?

A. Well, we had had a murder. I was looking to run the men down.

Q. You were looking for a murderer?

A. Yes.

Q. Now where you found Arthur Thomas was on the same side of the road as the barracks building, is that correct? (Indicating.)

A. That is right.

Q. Down here among a bunch of mesquite, is that correct, referring to the bottom portion of State's Exhibit 7 on the west side of the road?

A. That is right.

Q. And what did you do when you found these tracks?

A. I followed them as far as I could.

Q. All right. And did you discover Arthur Thomas?

A. After we found him.

Q. And who found him, if you know?

A. Mr. Brashear.

[Page 2212]

Q. Mr. Brashear?

A. Yes, sir.

Q. And he found him in a mesquite bush, is that right?

A. That is right. What he said.

Q. And you came up there, and Mr. Brashear called you?

A. No, he didn't call me. Somebody called me.

Q. Somebody called you, and you came up there, and when you came up, who was present? Arthur Thomas, Brashear, and who else?

A. Well, I believe Mr. Croom and Selchow.

Q. Selchow, Croom. That is Officer Croom, is that right?

A. That is right.

Q. And this was Officer Selchow from the Arizona State Highway Patrol, is that right?

A. That is right.

Q. And whom else?

A. Mr. Brashear. Did I name him?

Q. Yes.

A. Arthur Thomas and myself. That is about all I know. There was quite a few around there.

Q. Cecil Byrd was there? You know him, didn't you?

[Page 2213]

A. Cecil Byrd, that is right.

Q. Who else was out there, now?

A. I believe Mr. Cox came later on, or he was there pretty close. I am not sure.

Q. And there was some other people there, too, wasn't there?

A. Yes, sir.

Q. About ten or fifteen, weren't there?

A. I would say somewhere around there.

Q. And when you came up, what was Arthur Thomas doing?

A. He was laying on the ground.

Q. And then what happened?

A. When I got there?

Q. Yes.

A. I told him to get up.

Q. You told him to get up, and what did you say then?

A. I says, "You are under arrest."

Q. Did Arthur Thomas get up?

A. He got up.

Q. Did he try and run away?

A. No, I don't think there was any use in trying to run away.

Q. Just stood up?

A. Just stood up.

[Page 2214]

Q. Did you examine him to see if he had any instruments on him? Any guns or knives or anything like that?

A. No, I didn't.

Q. He stood up, and then what happened, Jack?

A. I asked him if he had murdered this woman.

Q. Yes. And what did he say, Jack?

A. No, he didn't.

Q. All right. That he didn't do it. And then what happened, Jack? Did you handcuff him?

A. He was being handcuffed while I questioned him.

Q. By whom?

A. Mr. Selchow.

Q. Officer Selchow?

A. Yes.

Q. He handcuffed him, and then what happened, Jack?

A. Somebody threw a rope on him.

Q. Didn't you see who it was?

A. No. I had my back to him. I just seen it when it went around him.

Q. It went around his neck, didn't it, Jack?

[Page 2215]

A. Well, I believe it was around his shoulders and neck.

Q. Shoulders and neck? How can you get a rope around the shoulders and neck?

A. It can go around this way. (Indicating.) Haven't you ever seen any—

Q. Oh. It was around one side of his neck, and then went around, is that right?

A. Well, it went around him.

Q. And then what did you say, Jack?

A. I said, "Stop that. I will take care of this."

Q. And then what did you do?

A. Took the rope off.

Q. How long between the time Thomas was roped and the time you took the rope off of his neck?

A. Just as soon as I could get to him.

Q. And you didn't see who roped him?

A. No, I didn't.

Q. Or did you just see the rope around Arthur Thomas' neck and the rope around somewhere else?

A. That is right.

Q. Who held the rope in his hand?

A. I believe it was Bob McComb.

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Q. Did you know who it was that day, Jack?

A. Never seen the man before, no.

Q. Did you ever try and find out his name?

A. No, sir.

Q. You have known Bob McComb, haven't you?

A. No, so help me God. A lot of people that I didn't know there.

Q. Now, Jack, when Thomas was standing there with the rope around one side of his neck, as you remember it, and around his shoulder, didn't you tell him, "See that rope there, boy? If you don't talk, I will let them rope you."

A. Absolutely not.

Q. You didn't say anything like that?

A. Let them rope him? The rope was already on. I taken it off immediately.

Q. You didn't say anything about letting them go ahead and lynch that boy, Arthur Thomas?

A. No, I taken the whole group down towards the car.

Q. You didn't say anything about letting him be roped if he didn't tell the truth?

A. Absolutely not.

The Court: Are all of the jurors hearing the answers?

All right. Speak up, Mr. Howard.

[Page 2217]

By Mr. Morgan:

Q. You never said, "I will let you go and throw that rope over a tree over there if you don't tell the truth"?

A. No, sir.

Q. Did you say anything similar to that?

A. No, sir, absolutely not.

Q. You know you are under oath now?

A. That is right.

Q. And you never said anything similar to that?

A. No, sir.

Q. Now did anyone else say anything about roping or lynching Thomas?

A. No, sir.

Q. At that time?

A. No, sir.

Q. No one?

A. Right. No one.

Q. Did anyone say anything about, "If you don't tell a better story, we will hang you."

A. No, sir.

Q. Referring to Thomas?

A. No, sir.

Q. Now didn't they start to lead Thomas away while that rope was around his neck, and you had to walk after him to get that rope away?

[Page 2218]

A. I did.

Q. And they went fifteen or twenty feet or so, didn't they, Jack?

A. No. In my estimation it wasn't over ten or twelve.

Q. And they headed down towards those trees?

A. No. They headed towards my car, and the trees was off to the left. That old cottonwood.

Q. And they had to go by that cottonwood to get to your car?

A. Pretty close.

Q. And you don't know whether they were starting for the trees or for your car, do you?

A. They weren't going nowhere. I stopped them.

Q. You don't know whether they started to go toward the trees or that car?

A. They just started off, and I stopped them.

Q. You took the rope off, and what did you do then?

A. Taken him immediately towards the car.

Q. And he didn't try to run away, did he, Jack?

A. No.

Q. He didn't have any guns or pistols on, did he?

[Page 2219]

A. No, sir.

Q. And you took him down to your car, walked him down to your car?

A. That is right.

Q. And you got in your car and went over to find Cooper, didn't you?

A. Yes he said he knew where Cooper was.

Q. And you went up to find Cooper, didn't you?

A. That is right.

Q. How far did you go to find Cooper, Jack?

A. Oh, I would say it was around maybe two and a half miles.

Q. Two and a half miles?

A. Something like that.

Q. You found him north of the barracks and west of the barracks, is that correct? Well, turn around and we will look at State's Exhibit 7 here.

Pointing out State's Exhibit 7, it was over west of the northeast quarter of Section 26, is that right, Jack?

A. Somewhere over there.

Q. If State's Exhibit 7 were extended west, it would be over here someplace.

[Page 2220]

A. That is right.

Q. And Cooper was over there picking up roots? Isn't that what he was doing?

A. He was piling brush.

Q. When you pulled up your car there, you saw Cooper being roped about a couple of hundred feet away, didn't you?

A. When I pulled up in my car?

Q. Yes.

A. No, sir.

Q. You saw him roped, didn't you?

A. Yes, sir.

Q. And you saw him roped just about the time you got there, wasn't it?

A. No. I had been across the field.

Q. You had been across the field and you saw Cooper roped?

A. That is right.

Q. And he was roped around the neck, wasn't he?

A. No, sir, he was not.

Q. Oh. He was roped above the waist?

A. Right here. (Indicating.)

Q. And who roped him, Jack?

A. I didn't know that man.

Q. Did you ever find out his name, Jack?

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A. Just the other day.

Q. What was his name?

A. Wasn't it—I believe it was Arzberger, or something like that.

Q. And who did you find out from, Jack?

A. I heard it here.

Q. Did you ever try and find out that man's name?

A. No.

Q. And he roped him, and he brought him across the field to you, is that right?

A. No. He was pretty close to the car.

Q. Pretty close to the car? So Thomas could see it, too, I guess.

A. Thomas was in the car at the time.

Q. And he was on horseback, wasn't he? This man that roped Cooper?

A. Yes.

Q. And he led him across the field?

A. He followed him along.

Q. And he jerked a little bit. (Indicating.)

A. No. Just led him along. he was holding to the rope with his hand.

Q. Holding onto the rope?

A. Around here. (Indicating)

Q. He was holding onto it with his hands?

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A. And I got up there and taken it off of him.

Q. Right in front of the car, you took it off, didn't you, Jack?

A. Yes. It was pretty rough ground there. All broke up and cloddy.

Q. Pretty hard to walk across, isn't it, Jack?

A. Pretty soft. You can walk across it, but it was broken ground.

Q. And you handcuffed Cooper, didn't you?

A. No, I didn't handcuff Cooper.

Q. Who handcuffed him?

A. One of the other boys.

Q. Who was there? You were there. Thomas was there, Ross Lee Cooper was there, the fellow who turns out to be Gus Arzberger, he was there. Whom else?

A. I believe—

Q. Brashear was there?

A. Brashear was there.

Q. And Croom was there, wasn't he?

A. Well, he got there a little later.

Q. And Cox was there?

A. No, I believe Cox—he could have been. I think he went back to Willcox.

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Q. And Selchow?

A. No, he went back.

Q. And Bill Sauders, the photographer, he was around there, wasn't he?

A. I believe he was.

Q. He took some pictures of the roping, didn't he?

A. Well, he taken a picture there. Not about the—not of the roping. I believe he taken a picture over there where Thomas was by the fence.

Q. And after you got Cooper back to the car, you got Thomas out of the car, didn't you?

A. I asked him to get out and look and see if this was the man he said murdered the woman. He said, "That is him."

Mr. Morgan: We move that the answer be stricken as unresponsive. I asked him if he asked Thomas to get out of the car, and it was unresponsive, your Honor. I just asked him one simple question, as to whether Thomas got out of the car.

The Court: The balance of the answer may be stricken and the statement about Cooper, the jury are instructed to disregard.

By Mr. Morgan:

Q. All right. Now after you got out there and you found [Page 2224]

Thomas there, and then Cooper was handcuffed, both Cooper and Thomas were roped again around the neck, weren't they?

A. They was roped while I was standing there questioning them.

Q. And right around the neck, weren't they?

A. Well, the rope went around them. That is all. I taken it off.

Q. And who roped them that time?

A. Well, it was that other guy.

Q. Gus or McComb?

A. No.

Q. Another guy?

A. No. I called his name.

Q. Gus Arzberger?

A. Arzberger.

Q. He roped them again right around the neck, and they jerked to the ground, didn't they?

A. Yes. He just pulled them down on their knees.

Q. He just pulled them down on their knees? He was still on a horse, wasn't he?

A. Yes, he was still on a horse.

Q. They were your prisoners then, weren't they?

[Page 2225]

A. I had them under arrest.

Q. Yes. They were your prisoners?

A. (No answer.)

Q. And then Cooper—after they got up on their feet, you took the rope off, is that right?

A. No. I taken it off immediately.

Q. And then Cooper was roped again by Gus Arzberger, wasn't he?

A. No. No. I put them in the car.

Q. Now Brashear was there, wasn't he?

A. I believe he was up there.

Q. And if Officer Brashear said Cooper was roped again after Thomas and Cooper had been roped together, is he telling the truth?

A. He was roped out in the field, and after they were together. Just twice.

Q. Thomas was roped once where he was arrested?

A. Yes.

Q. That is once. Thomas was roped there. And Cooper was roped over here two and a half miles north, and then Cooper and Thomas were roped again?

A. That is all.

Q. Cooper wasn't roped again?

A. No, sir, not to my recollection.

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Q. Now at the time you were over there with Cooper and Thomas together and they were both handcuffed and they had both been roped, did anyone at that time make any statement about taking these boys out and roping them up, or lynching them?

A. No, sir absolutely not.

Q. Did you make any statement about the fact if they didn't tell the truth, you would let him go ahead and be roped?

A. No sir. Just put them in the car.

Q. You made no statement at any time out there at the time of the arrest of either Thomas or Cooper, or Thomas and Cooper, implying if these men didn't tell the truth, you would let them be roped?

A. No, sir. No, sir. That is not right.

Q. Now after you got Thomas and Cooper back in the car, where did you drive them to, Jack?

A. We came back to the Kansas Settlement road, and went to Willcox.

Q. About what time of day was that that you finally got in the car and started out for Willcox?

A. I believe it was around 4:30.

Q. And where did you take them up in Willcox?